NORTH CAROLINA

DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 EDC 0645

Student, by parent or guardian *Parent*,	)	
Petitioners,	)	
vs.	)	**ORDER OF DISMISSAL**
DURHAM PUBLIC SCHOOLS,	)	
Respondent.	)	

THIS contested case was heard before Chief Administrative Law Judge, Julian Mann III, on April 26 – 29 and May 4, 2010, in Durham, North Carolina. At the close of Petitioners' evidence, Respondent moved to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. After careful consideration of the sworn testimony of Petitioners' witnesses, including Petitioners, the exhibits offered and admitted into evidence by Petitioners, and the entire record in this proceeding, and after hearing arguments from Petitioner *Parent* and counsel for Respondent, the undersigned is of the opinion that the above-captioned contested case should be dismissed and hereby makes the following Findings of Fact and Conclusions of Law.

APPEARANCES

For Petitioners: *Parent, pro se*
Durham, NC

For Respondent: Deborah R. Stagner
Christine T. Scheef
Tharrington Smith, LLP
209 Fayetteville Street
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WITNESSES

For Petitioners: M.F.
J.L.
R.B.
H.L.
N.D.
N.C.

Dr. T.M.
E.B.
M.C.
M.G.
D.R.
A.W.
J.P.
B.E.
W.C.
E.S.
N.M.
Student, petitioner
Parent, petitioner

ISSUES FOR HEARING

Whether Petitioners have successfully met their burden of proof in demonstrating that the District denied *Student* a free appropriate public education (FAPE) by allegedly:

a. Failing to locate, identify, and evaluate *Student* for special education services under the IDEA;
b. Failing to hold a manifestation determination review (MDR) prior to *Student*'s October 2009 long-term suspension from *HHS*; and
c. Failing to determine that *Student* is eligible for special education services under the IDEA.

STANDARD OF REVIEW

The North Carolina Rules of Civil Procedure provide, in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff[.]

N.C. Gen. Stat. § 1A-1, Rule 41(b).

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony." *Dealers Specialties, Inc. v. Neighborhood Housing Servs, Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Moreover, in determining the sufficiency of the evidence when ruling on a motion

to dismiss made under Rule 41(b), the judge is not bound to make inferences in favor of the plaintiff's (Petitioner's) evidence. *Id.* at 638, 291 S.E.2d at 140. Where the plaintiff's (Petitioner's) evidence shows no right to relief, the defendant (Respondent) is entitled to have its motion to dismiss granted. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 827, 266 S.E.2d 18, 19 (1980).

After weighing all of the evidence and assessing the credibility of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner *Student* is a 17-year-old high school student currently enrolled in the ABC School. *Student* has not previously received special education services.

2. Respondent Durham Public Schools is a local education agency (LEA) that receives funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA).

3. Petitioner *Student*, by and through his parent, *Parent*, filed a contested case petition on February 18, 2010, alleging that the Durham Public Schools denied *Student* a free appropriate public education (FAPE).

4. In the Petition, *Parent* alleged that the Respondent failed to provide *Student* a free appropriate public education when it (a) failed to locate and identify *Student* as a child in need of special education services, (b) failed to conduct a manifestation determination review after *Student* was recommended for long-term suspension from *HHS* in October 2009, and (c) determined that *Student* was not eligible for special education services in February 2010.

5. Petitioners sought as relief: (a) authorization for *Student* to participate in all extracurricular functions at *HHS* while he finishes his graduation requirements at the ABC ; (b) a public apology from the Respondent and *HHS*; (c) removal of all suspensions from *Student*'s student records; (d) development of an IEP for *Student* "to allow transition into schools of higher learning"; (e) a functional behavior assessment ("FBA") for *Student*; and (f) the removal of the *HHS* principal, an assistant principal, and a teacher.

6. *Student* has attended the Respondent's schools for his entire academic career and began attending H/H School as a freshman in August 2006. The principal of H/H School at that time was XX, with whom *Student* had a good relationship.

7. During his 9th grade year at *HHS*, *Student* received multiple disciplinary referrals, including several out-of-school suspensions. *Student* received fewer referrals and was suspended less frequently in 10th and 11th grades. *Student*'s misbehavior occurred from time to time inside the classroom but predominated outside of the classroom.

8. *Student* progressed academically in school and was promoted at each grade level. While at *HHS*, *Student* participated in varsity sports and the school's chess club. *Student* had earned enough credits by June 2009 to be a senior.

9. *Student* began his senior year at *HHS* in August 2009. H.L. replaced *E.P.* as the principal of *HHS* in July 2009.

10. *Student* was disciplined in September 2009 after he refused to follow an administrator's directive to pull up his pants. As a result of that refusal *Student* was assigned for the remainder of the school day to in-school suspension. *Student* refused to follow the directives of the in-school suspension teacher and was therefore suspended out-of-school for three days.

11. After this suspension, *Parent* told *Student* that he should not speak with *HHS* administrators unless she was present.

12. In October 2009, *Student* had an encounter with a teacher who approached him in a hallway. H.L. recommended that *Student* be suspended from *HHS* for the remainder of the school year due to the incident which involved allegations of threatening and disrespectful behavior.

13. Shortly after H.L.'s suspension recommendation, *Parent* sought legal counsel. *Parent*'s attorney contacted the Respondent and asserted that *Student* was entitled to the protections of the IDEA, because the school district had a basis of knowledge from which it should have concluded that *Student* might be a child with a disability. In an October 23, 2009 letter, *Parent*'s counsel stated that *Student* had an "as of yet unidentified condition or disability."

14. *Parent*'s attorney provided the Respondent with emails between *Parent* and various teachers and administrators at *HHS*, as well as a letter to *E.P.* from *Parent*, dated September 2006. In that letter, *Parent* described *Student* as "borderline ODD," and recommended several ways in which staff who worked at *HHS* High could change their behavior in order to avoid upsetting *Student*

15. No evidence was presented at hearing that *Student* had been currently diagnosed with Oppositional Defiant Disorder (ODD) or the underlying basis for this or any other asserted disorder.

16. No request was made by or on behalf of *Parent* that *Student* be evaluated for special education services. *Parent* acknowledged that she made no such request, either orally or in writing, prior to *Student*'s long-term suspension in October 2009.

17. No request was made by *Parent* that *Student* was in need of special education and related services. In testimony, *Parent* acknowledged that prior to *Student*'s long-term suspension in October 2009, she did not express to Respondent that *Student* was in need of special education and related services.

18. No request was made by or on behalf of *Parent* to Respondent expressing specific concerns about a pattern of behavior demonstrated by *Student* to the director of special education or any supervisory personnel. *Parent* did not introduce any evidence at hearing that any teacher

or other school personnel expressed specific concerns about a pattern of behavior to the director of special education or any supervisory personnel.

19. Exceptional Children's Facilitator W.C. searched Respondent's records and found no indication that *Student* had been referred to, evaluated by, or served by the exceptional children's program. Based on the lack of any referral or contact with the exceptional children's program prior to the misbehavior leading to *Student*'s suspension, and after reviewing *Student*'s academic performance, attendance and behavior referrals, Respondent informed *Parent* that *Student* was not entitled to the protections of the IDEA and that therefore no MDR would be conducted.

20. *Student* appealed his long-term suspension pursuant to Respondent's policies. The suspension was ultimately upheld by the Board of Education. Petitioners did not seek judicial review of *Student*'s long-term suspension.

21. During the appeal process, *Student* was offered enrollment at Lakeview School; however, *Parent* refused to allow *Student* to attend Lakeview.

22. In November 2009, after *Student* was recommended for long-term suspension, *Parent* requested that *Student* be evaluated for special education services.

23. In response to *Parent*'s request, an IEP meeting was scheduled for December 2, 2009, to initiate the referral process and determine whether *Student* was eligible for special education services under the IDEA. Although *Parent* had previously asserted that *Student* has Attention-Deficit/Hyperactivity Disorder and "borderline" Oppositional Defiant Disorder, there is no evidence in the record or documentation from health care providers to justify that assertion, other than *Parent*'s own opinion and analysis.

24. At the December 2nd meeting, the IEP team determined that additional evaluations were needed before a decision could be made regarding *Student*'s eligibility for special education services. Written consent for evaluation was given by *Parent* on December 2, 2009. Respondent's personnel made attempts during December 2009 and January 2010 to arrange and complete testing of *Student* in order to complete the evaluation process.

25. The evaluation process was completed in due course but may or could have been completed more quickly had *Student* been enrolled at Lakeview School

26. Psychological testing was conducted by school psychologist N.M.. Educational testing was conducted by W.C.. Hearing and vision screenings were also conducted by the District. Because *Student* was not attending school, documentation of research-based interventions could not be obtained.

27. The IEP team met again on February 3, 2010, to consider *Student*'s eligibility for special education and related services under the IDEA.

28. The IEP team considered two potential areas of eligibility for *Student*: Emotional Disability ("ED") and Other Health Impairment ("OHI").

29. *Parent* supplied to Respondent a document from Holly Hill Hospital indicating that *Student* had a "Mood Disorder" (Not Otherwise Specified). The document was not signed by a medical doctor or psychologist, nor was there any explanation or substantiation of the meaning or explanation of the term.

30. The psychological evaluation completed by Mr. M concluded that *Student* has the intellectual ability "to succeed with the standard course of study." Additionally, while noting that *Student* has exhibited "overactive/impulsive/inattentive behaviors and . . . oppositional and defiant behaviors," the evaluation concluded that those behaviors "are typically not unmanageable in the classroom nor have they generally been seen as frequently or pervasively [a]ffecting his performance in school." (Petitioner's Exhibit #23)

31. The testing conducted by DPS demonstrates that *Student* is of average intelligence and that his achievement levels are also in the average range.

32. Based on the information available, the IEP team determined that *Student* did not meet the criteria for OHI because he did not have a medical diagnosis of ADHD. The team also found no adverse effect on *Student*'s educational performance and no evidence that he required specially designed instruction. The IEP team also determined that although *Student* met the criteria for ED, his unspecified condition (mood disorder) did not have an adverse effect on his educational performance and he did not require specially designed instruction to make academic progress. This determination was supported by the Respondent's evaluations and *Student*'s educational history.

33. At the February 3, 2010 meeting, Petitioner *Parent* stated that she requested the Respondent to pay for an independent educational evaluation (IEE). *Parent* testified at hearing that the Respondent provided her with a list of independent evaluators. *Parent* did not pursue an IEE.

34. Three administrators and seven current and former teachers from *HHS* testified. Their testimony established that *Student* had good relationships with some of his teachers. In these classes, *Student* did not have significant behavior referrals and he made good to average grades. *Student* had difficult relationships with other teachers, and in these classes he did not do as well behaviorally or, at times, academically.

35. *Student* had a good relationship with former *HHS* principal *E.P.* and with assistant principal J.L.. *Student* did not have particularly good relationships with assistant principal R.B. or current *HHS* principal H.L.. *Student* and his mother perceived that the new administration at *HHS* was targeting *Student*

36. Petitioner *Parent* does not hold any teaching certification and does not have a degree in education. *Parent* demonstrated that she has exercised exemplary concern for her son's academic and mental well being.

37. Petitioner *Parent* does not hold any medical or psychological certification but her opinions and analysis evidenced her son's emotional instability and her attempts at resolving this instability.

38. *Student* has had no behavioral issues since his enrollment at the ABC . He has been successful academically at the ABC in the general curriculum and in a regular education setting. *Student* has made up four credits since his enrollment at the ABC and is on track to graduate from high school in June 2010 with a regular high school diploma. *Student* is currently taking prescribed mediations that seem to provide to him greater emotional stability.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this instance, Petitioners are the party seeking relief and therefore bear the burden of proof.

3. Before a child can be eligible for special education and related services under the IDEA, state or local education authorities must evaluate the child and determine that he is "disabled" within the meaning of IDEA. 20 U.S.C. § 1414(a)-(c). IDEA eligibility requires more than a diagnosis or a finding of a disabling condition. *See, e.g., Fauquier County Pub. Schs.*, 20 IDELR 579 (Va. SEA 1993); *Alvin Indep. Sch. Dist. v. Patricia F.*, 503 F.3d 378, 382 (5th Cir. 2007) (student diagnosed with ADHD); *A.P. v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221 (D. Conn. 2008) (student "at risk" for ADD); *Willis v. Lumberton Indep. Sch. Dist.*, 2007 WL 2071798, 48 IDELR 93 (S.D. Miss. 2007); *Bonita Unified Sch. Dist.*, 32 IDELR 273 (Ca. SEA 2000) (diagnosis of depression).

4. If a student is determined after an appropriate evaluation to have a disability but needs only a related service and not special education, the child is not a child with a disability under the IDEA. 34 C.F.R. § 300.8(a)(2)(i); N.C. 1500-2.4(a)(2)(i).

5. The document from Holly Hill Hospital indicating that *Student* has a mood disorder (not otherwise specified), does not rise to the level of a diagnosis for a determination that *Student* is a student with a disability under the IDEA. Petitioners failed in their burden to establish that *Student* had a disability under the IDEA, although this document was some evidence of a disability.

6. A student who has not previously been identified as eligible for special education services under the IDEA is entitled to the procedural protections of the IDEA only if the Respondent had knowledge that the student was a child with a disability before the behavior that precipitated the disciplinary action. Petitioners have the burden of establishing this "basis of knowledge" by proving that one of three circumstances existed:

(1) The parent expressed concern in writing to the child's teacher or supervisory or administrative personnel that the child is in need of special education and related services; or

(2) The parent requested an evaluation of the child; or

(3) A teacher or other school personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel of the LEA. 20 USC § 1415(k)(5); 34 C.F.R. § 300.534(b); NC 1504-2.5 (b).

7. A parent may also establish that a school district had a "basis of knowledge" if "prior to the behavior that precipitated the disciplinary action, the behavior and performance of the child clearly and convincingly establishes the need for special education. Prior disciplinary infractions shall not, standing alone, constitute clear and convincing evidence." N.C. Gen. Stat. § 115C-107.7(c). *Student*'s prior disciplinary history within the relevant periods preceding his suspension were not established either by the preponderance of the evidence or by clear and convincing evidence to inform Respondent of the required "basis of knowledge."

8. The Respondent was not required to hold a Manifestation Determination regarding *Student*'s October 2009 misconduct because the Respondent lacked a "basis of knowledge" that *Student* was disabled. While *Student* had some disciplinary history, prior disciplinary infractions do not, standing alone, constitute clear and convincing evidence of a basis of knowledge. N.C. Gen. Stat. § 115C-107.7(c).

9. Petitioners have failed to prove by a preponderance of the evidence that the Respondent committed a procedural violation that constituted a denial of a free appropriate public education.

10. As to allegations of a procedural violation, a hearing officer or administrative law judge may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. 1415(f)(3)(e).

11. Petitioners have failed to establish that *Student* is a student with disabilities eligible for special education and related services under the IDEA. If a procedural violation occurred, which was not established by the preponderance of the evidence, as a result of the Respondent's refusal to hold a Manifestation Determination prior to *Student*'s long-term suspension, such a procedural violation did not impede *Student*'s right to a FAPE or cause a deprivation of an educational benefit.

12. *Parent* did not allege or prove by a preponderance of the evidence that her opportunity to participate in the decision making process was significantly impeded.

13. *Parent* relied on her own opinions and observations to support her contention that *Student* required special education services. As a parent, this testimony is some evidence of a disability but does not rise to the level of proof required of Petitioners. *Parent* did not possess the educational qualifications or credentials to accurately assess or diagnose *Student*'s abilities or performance. Apart from her opinions, *Parent* presented no evidence that the decision of the IEP

team was in error when it determined that *Student* was not eligible for special education services under the IDEA. *See Mr. G. and Ms. K. v. Timberlane Regional Sch. Dist.*, 47 IDELR 5, 2007 WL 54819 (D. N.H. 2007) (unpublished) (holding that parent's opinions about student's performance were insufficient to establish denial of a FAPE).

14. Because *Student* is not eligible for special education services under the IDEA, the Respondent was not required to develop an IEP or undertake an FBA.

15. Petitioners have not sustained their burden of proof by the preponderance of the evidence that *Student* was denied a FAPE.

16. *Parent* has demonstrated a significant care and concern for her son's well-being and has been a single mother devoted to preparing her son for a college education.

17. *Student*, in his testimony, demonstrated that he is a student capable of being successful in academic pursuits as well as in meaningful extra curricular activities.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that all of Petitioners' claims are **DISMISSED WITH PREJUDICE**.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the person designated by the State Board under N.C. Gen. Stat. § 115C-107.2(b)(9). The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. N.C. Gen Stat § 115C-109.9 (a).

This the _____ day of June, 2010.

_____

Julian Mann III
Chief Administrative Law Judge